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IN THE HIGH COURT OF JUDICATURE AT BOMBAY@@
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APPELLATE SIDE@@
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WRIT PETITION NO. 2168 OF 1986@@
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Mrs Maude D'Penha and anr ... Petitioners
vs
1. Mr Sapal Framroze Printer & anr ..Respondents
..
Mr.A.K.Abhyankar for Petitioners
Mr.Y.S.Jahagirdar Sr.Counsel with Mr.P.S.Dani
with Mr.H.N.Vakil i/b Mulla & Mulla for
Respondents

CORAM : D.G.KARNIK, J@@
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DATE: 16TH AND 19TH JULY, 2004@@
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ORAL JUDGMENT@@
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16TH JULY, 2004.@@
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1. This Writ Petition under Article 227 of the Constitution of India is directed against the judgment and decree of the Appellate Bench of the Small Causes Court, Mumbai passed on 24th December, 1985 dismissing Appeal No.238 of 1975.

2. The premises in question are the entire second floor of the building known as "Maudestan" and a garage on the ground floor situate at 194, D'Monto Park, Bandra, Mumbai-400050 (hereinafter referred to as the suit premises). The petitioners are the landlords. The respondent nos. 1 and 2 were the tenants both of whom have died and are represented by their daughter, the respondent no. 2A. Initially, the suit building consisted of only two floors namely ground and first floor. By an agreement of lease dated 8th May, 1951 the respondents, were permitted to erect second floor on the existing building and also to construct a garage on the ground. The total cost of construction of Rs.21,500/-was to be recovered by the respondents by adjustment from the rent. It is not in dispute that the entire cost of construction incurred by the respondents has since been

recovered.

3. Sometime in November, 1965 the petitioners filed a suit against the respondents bearing R.A.E.No.714 of 1965 in the Small Causes Court, Mumbai for possession on the ground of change of user, breach of the conditions of tenancy by making of unauthorised erections alterations, and conduct amounting to nuisance and annoyance. On 7th July, 1970 the petitioner amended the plaint and added one more ground of eviction namely that the respondents had acquired suitable alternative premises for residence. viz. four flats on the second floor in Suraj Cooperative Housing Society, Pandya Lane, Santacruz, Mumbai. By filing an additional written statement the respondents denied in toto the allegation of acquisition of the premises.

4. The trial court passed a decree for possession on the ground of nuisance and change of user. Other grounds were negatived. As far as the ground of acquisition of alternative premises under section 13 (1) (l) of the Bombay Rents, Hotel and Lodging House Rates Control, Act, 1947 (hereinafter referred to as the Act) was concerned the trial court held that three flats were acquired by the respondents sometime in July or August, 1964 but, were disposed of in August, 1967 i.e. before the plaint was amended and the respondents were not in possession thereof at the relevant time, and hence no decree for eviction could be passed under section 13 (1) (l) of the Act.

DATE: 19TH JULY, 2004.

5. The trial court held that the garage was let out for the purpose of parking of a car but was used by the respondents for commercial use contrary to the terms and conditions of the letting. The trial Court further held that conitinued use of the garage for commercial purposes after the service of notice constituted breach of the conditions of the tenancy and amounted to change of user. It also held that the respondents were guilty of a conduct which amounted to nuisance and annoyance to the adjoining and neighbouring occupiers. In view of the findings on the change of user and nuisance and annoyance, the trial Court passed a decree for possession.

6. Being aggrieved, the respondents filed an appeal bearing Appeal No. 238 of 1975 before the Appellate Bench of the Small Causes Court, Mumbai. The Appellate Bench held that the petitioners had

permitted and allowed the respondents to use the garage for the purpose of manufacturing potato wafers and the garage was used for that purpose with the knowledge and consent of the petitioners. The Appellate Bench therefore held that the use of the garage for the purpose of manufacturing of potato wafers by the respondents did not constitute change of user nor did it constitute a breach of the terms and conditions of the tenancy. It further held that in any event the petitioners had waived the alleged breach of the terms and conditions of tenancy by the respondents by change of use of the garage from parking to manufacturing of wafers. The Appellate Bench also reversed the finding of the trial Court that conduct of the respondents amounted to nuisance and annoyance to the adjoining and neighbouring occupiers. Consequently, the Appellate Bench allowed the appeal and dismissed the petitioners' suit for possession.

7. The petitioners had not filed any cross objections against the finding recorded by the trial Court on the issue of acquisition of suitable alternative residential premises by the respondents. However, relying upon the provisions of Order 41 Rule 22 of the Code of Civil Procedure the petitioners urged before the Appellate Bench that they were entitled to support the decree for possession passed by the trial court not only on the grounds on which it was passed but they were also entitled to state that the finding recorded against them on the issue of acquisition of suitable alternative residential premises should have been in their favour and the decree for possession should be confirmed on that ground also. From the judgment of the Appellate Bench, it appears that the respondents did not object to the petitioners' contention that they were entitled to support the decree for possession on the ground of acquisition of suitable alternative premises The Appellate Bench therefore examined the contention of the petitioners of alleged acquisition of suitable alternative residential premises by the respondents on merits. The Appellate Bench also held that the alternative premises acquired by the respondents were disposed of by them before the amendment of the plaint and therefore the petitioners were not entitled to a decree for possession on that ground. In this view, the Appellate Bench allowed the appeal of the respondents and dismissed the suit for possession filed by the petitioners by its judgment and order dated 24th December, 1985. That judgment is impugned in this petition.

8. When this petition first came up for hearing before this court on 16th September, 2002 the respondents remained absent. This court proceeded to hear the petition on merits in the absence of the respondents. This court held that the respondents had acquired suitable residential premises in Suraj Cooperative Housing Society Ltd and the petitioners were entitled to a decree for possession on that ground. Accordingly, by a judgment and order dated 16th September, 2002 this court allowed the petition and passed a decree for possession. On Special Leave Petition filed by the respondents, the Supreme Court set aside the order passed by this court subject to payment of costs of Rs.15,000/- by the respondents and directed this court to hear the writ petition again on merits in accordance with law. That is how the matter is before this court again.

9. Mr. Abhyankar, learned counsel for the petitioners submits that the findings recorded by the trial court about the change of user of the garage to commercial use, breach of the terms and conditions of the tenancy and nuisance and annoyance in favour of the petitioners were proper and lawful. The decision of the Appellate Bench reversing the findings is wrong and perverse. He also submits that both the courts below erred in law in not passing a decree for possession on the ground of acquisition of suitable residential premises, as the fact of acquisition of three flats in Suraj Cooperative Housing Society Ltd was admitted by the respondents in their evidence. A decree for possession should have been passed on that ground. The sale of the flats subsequent to the filing of a suit was of no consequence. In support, he relies on the decisions of the Apex Court in Sh.Dewan Chand Bhalla vs. Dr. Ashok Kumar Bhoil reported in AIR 1995 S.C.10 and Mohini Badhwar vs Ashok Saran reported in (1989) 3 SCC 72. In my view, the petitioners are entitled to a decree for possession on the ground of acquisition of suitable alternative residential premises by the respondents and hence it is not necessary for me to consider whether the findings of the Appellate Bench on the other two issues are perverse, as contended by the learned counsel for the petitioners.

10. In the suit as originally filed, the petitioners had not pleaded the ground of acquisition of suitable residential premises elsewhere by the respondents. However, by an amendment made on 7th July, 1970 the petitioners

pleaded that after coming into operation of the Act, the respondents had acquired vacant possession of four flats in Suraj Cooperative Housing Society Ltd. In the additional written statement filed by the respondents, they emphatically denied to have acquired vacant possession of or to have been allotted any flat in Suraj Cooperative Housing Society Ltd. The petitioner no. 1 examined herself on oath and stated that the respondents had acquired three flats in Suraj Cooperative Housing Society Ltd, Juhu. One flat was purchased by the respondent no. 1 in his own name, one in the name of his daughter Ms Pervez who has been brought on record as an heir and the third in the name of Mrs D.H.Kaka, the mother-in-law of the respondent no.1 and the mother of respondent no.2. The petitioners also examined on oath Vedprakash Checker, Secretary of the Suraj Cooperative Housing Society Ltd who had brought with him the records of the society. He stated on oath that flat No. A-13 was purchased by the respondent no.1 himself, flat no.A-14 was purchased in the name of Mrs D.H.Kaka and flat No. A-15 was purchased in the name of Ms Pervez Printer the respondent no.2A. He further stated that each of the flat admeasures about 525 to 550 sq.ft and consists of two rooms, a kitchen, a bathroom and a W.C. In view of the unimpeacheable evidence brought on record by the petitioners about the acquisition of the three flats bearing A-13, A-14 and A-15 in Suraj Cooperative Housing Society, the respondents gave up the defence of total denial taken by them in the written statement and in her deposition the respondent no.2 admitted the acquisition of the three flats. Before me, it is not disputed that the respondents had acquired three flats bearing A-13, A-14 and A-15 in Suraj Cooperative Housing Society Ltd. So also it is not disputed that the flat which stood in the name of Ms D.H.Kaka mother-in-law of respondent no.1 belonged to the respondents. Learned counsel for the petitioners states that Mrs D.H.Kaka has died more than 15 years ago and this is also not disputed by the respondents. The respondent no. 2 was her only daughter though she had another son who has also died. For all practical purposes, the respondents have admitted that flat nos. A-13,A-14 and A-15 in the Suraj Cooperative Housing Society Ltd were acquired by them.

11. In cross-examination of Vedprakash Checker, Secretary of Suraj Cooperative Housing Society Ltd it was suggested that Flat No. A-14 was sold to Sardar Bhubna on 7th December, 1968, flat no. A-15 was sold to T.N.Ramachandraan on 7th December, 1968 and flat no. A-13 was sold to Mr.Rebello on 28th

April, 1973. Learned counsel for the respondents submits that though the name of Mr. Rebello was entered in the records of the society on 28th April, 1973 that flat was also sold prior to the amendment of the plaint and therefore on the date when the plaint was amended, the respondents were not the owners of any of the three flats. Mr. Jahagirdar therefore supports the findings recorded by the courts below that on the date of amendment of the plaint, the respondents neither were the owners and nor possessed the flats bearing nos. A-13,A-14 and A-15 in the Suraj Cooperative Housing Society Ltd and therefore they cannot be said to have acquired suitable residential premises. It is trite that normally amendment to the plaint relates back to the date of institution of the suit. Only in case of addition of a new party the suit as regards additional party is deemed to be instituted when he was so made as a party. (See 21 of the Limitation Act). In all other cases the amendment, when allowed and incorporated in the plaint, relates back to the date of institution of the suit. The suit from which present writ petition arises was filed in November, 1965. In para 22 of its judgment, the trial court has recorded a finding of fact that the three flats were acquired by the plaintiff in July-August, 1964. In para 27 of its judgment, the Appellate Bench has also recorded a finding of fact that the three flats were acquired in August, 1964. The trial Court has held that Ms Pervez sold her flat on 31st August, 1967 and other two flats were sold on 21st July, 1968. The Appellate Bench has also held that flat nos. A-13,A-14 and A-15 were sold in or around July 1968. A concurrent finding is recorded by the courts below that the three flats were acquired in July/August, 1964 and sold between July 1967 and in July/August, 1968. Thus, on the date when the suit was filed in November, 1965 the petitioners had acquired and were possessed of the three flats bearing Flat nos. A-13,A-14 and A-15 in the Suraj Cooperative Housing Society Ltd. No defence was raised in the written statement that the flats were not suitable residence. Similarly, no evidence was adduced that the flats were not suitable for the purpose of residence. The total area of the three flats is around 1500 sq.ft. All the flats are situated in one and the same building on the same floor and are contiguous to each other. Each of the flat is of three rooms including kitchen and therefore the total number of rooms in the three flats are 9. As on the date of the suit, the respondents's family consisted of three permanent members namely respondent no.1, respondent no.2 and their daughter Ms Pervez the respondent no.2A. In

addition, the mother of the respondent no. 2 occasionally used to stay with the respondents. Assuming that she was a member of the respondent's family it consisted of not more than four members. It is not shown that the three flats consisting of 9 rooms were not suitable for the purpose of residence of the respondents. Thus, on the date of the institution of the suit, the respondents had acquired and were possessed of suitable alternative residential premises.

12. Mr Jahagirdar, learned senior counsel appearing for the respondents however submits that the three flats were purchased by the respondents by way of investment and for the purpose of resale. The respondents possessed the three flats only for a short period of around four years and they sold the flats even before the plaint was amended. As the respondents were not the owners and were not possessing the said flats on the date of amendment, the decree for eviction cannot be passed against them on the ground of acquisition of suitable alternative residential premises. I am not impressed by the contention. In Mohini Badhwar vs Ashok Saran (supra) the facts were that the tenant had obtained the vacant possession of alternative premises on 20th November, 1973 and had sold them on 24th November, 1973. The tenant was thus in possession of alternative premises for a period of only four days between 20th November, 1973 and 24th November, 1973. The acquisition of the premises for just four days was held to be acquisition of suitable alternative premises. It is also held that the fact that the tenant had lost possession of the alternate premises on the day when eviction petition was filed was of no consequence. In this connection, the Apex Court observed :

" It is apparent that on 20th November, 1973 the appellant came into the house belonging to her and it was available to her for her occupation. The circumstances that she lost possession on the date when eviction petition was filed does not protect the appellant against section 14 (1) (h) of the (Delhi Rent Control) Act.

13. In Dewan Chand Bhalla vs Dr. Bhoil (supra) the Supreme Court while considering section 14 (3) (a) (iv) of the Himachal Pradesh Urban Rent Act, 1971 held that clear and unequivocal words employed in the said provision would give no scope for a tenant to say that the accrued entitlement or right of a landlord to get back possession of a the residential building from him under the provision would be lost when he (tenant) parted with

possession of the residence which had come to him in one or the other ways referred to therein. The Supreme Court further said that to hold that the provision enabled a tenant to make his landlord lose his right to recover possession of the residential building accrued thereunder by the tenant parting with possession of the residence got by him either before or after the application for eviction is made by the landlord would amount to saying that a tenant by having recourse to certain means could defeat the accrued right of a landlord to get possession of the residential building.

14. The principle laid down in aforesaid two decisions of the Supreme Court though rendered under different Acts, is also applicable while construing section 13 (1) (l) of the Act. Even if a tenant who acquires possession of suitable residence disposes of or transfers the possession of such premises before the suit for possession is filed, he would be liable for eviction under section 13 (1) (l) of the Act For these reasons the contention of the learned counsel for the respondents that right of the petitioners to obtain possession was lost on account of the sale before the amendment to the plaint (or for that matter before the institution of the suit) of the alternative premises has to be rejected.

15. In the present case, the respondents are financially strong. They had constructed the suit premises with their own funds and the construction cost was recovered by them by adjustment from the rent payable. They were business family and were manufacturing wafers on a large scale in the garage. Though there is some controversy whether the garage was let out or allowed to be used for commercial purpose, the fact remains that the respondents have been carrying on business in the garage. They are rich and had purchased three residential flats in their own name or in the name of their daughter or mother-in-law. Their contention that the flats were purchased by way of investment itself shows that they had large investable funds for investment in immovable properties. In the written statement, they denied the acquisition in toto and only after the Secretary of the society was examined to prove the acquisition that they changed their stand from total denial to sale of the said flats. There is no pleading in the written statement about the sale of the flats. There is also no pleading about the unsuitability of the alternative premises. The judgments of the Court below are contrary to law as laid down by the Supreme Court in the two cases

mentioned above and contrary to the intention of the legislature in enacting the provisions of section 13 (1) (l) of the Act.

16. Mr. Jahagirdar, learned counsel for the resondents submits that as the petitioners had not filed cross objections in the appeal filed by the respondents in the first appellate Court, they were not entitled to urge before the Appellate Bench that a decree for possession should have been passed by the trial Court also on the ground of acquisition of suitable alternative premises. He therefore, submits that the petitioners are not entitled to urge the said ground in this Court also. Mr. Jahagirdar relies upon a decision of this court in Baban Sitaram Pandey vs Smt Saraswati Bhoirkar reported in 1997 (Vol 100) Bom.L.R. 243. In my opinion the said decision is no longer a good law in view of a later decision of the Supreme Court in Ravindra Kumar Sharma vs State of Assam reported in(1999) 7 SCC 435. In paragraph no. 23 of the decision the Supreme Court has observed:

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" In our view, the opinion expressed by Mookerjee,J of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena case and the view expressed by U.N.Bachawat, J in Tej Kumar case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent for the purpose of sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. The filing of cross-objection after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao case by the Madras Full Bench and Chandre Prabhuji case by this court is merely clarified by the 1976 Amendment and there is no change in the law after the amendment. "

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17. In view of the authoritative pronouncement of the Apex Court, it is open for a respondent in an appeal to contend that the decision on any issue which has been held against him by the trial court should have been in his favour and to support the judgment of the trial court on any ground which has been held against him. There is therefore no merit in the contention of Mr. Jahagirdar that the petitioners were not entitled to urge before the Appellate Bench to pass a decree on the ground of

acquisition of suitable residential premises by the respondents. Consequently, the petitioners are entitled to urge before this Court the ground of acquisition of suitable alternative premises by the respondents.

18. For these reasons, the petition succeeds. The impugned judgment and order of the Appellate Bench of the Small Causes Court is set aside and the decree for possession passed by the trial Court is restored. Rule made absolute with costs.

19. At the request of the learned counsel for the respondents and with the consent of the learned counsel for the petitions, execution of this order is stayed for a period of eight weeks subject to the respondents filing an undertaking (without prejudice to their right to appeal) in this court in the usual form within one week.

20. Certified copy expedited.

D.G.KARNIK, J@@
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